

DOCKET FILE COPY ORIGINAL

ORIGINAL

Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

JAN 29 1997
FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF SECRETARY

In The Matter of

ACCESS CHARGE REFORM

PRICE CAP PERFORMANCE REVIEW
FOR LOCAL EXCHANGE CARRIERS

TRANSPORT RATE STRUCTURE
AND PRICING

USAGE OF THE PUBLIC SWITCHED
NETWORK BY INFORMATION
SERVICE AND INTERNET ACCESS
PROVIDERS

CC Docket No. 96-262

CC Docket No. 94-1

CC Docket No. 91-213

CC Docket No. 96-263

**COMMENTS OF THE
TELECOMMUNICATIONS RESELLERS ASSOCIATION**

**TELECOMMUNICATIONS
RESELLERS ASSOCIATION**

Charles C. Hunter
Catherine M. Hannan
HUNTER & MOW, P.C.
1620 I Street, N.W.
Suite 701
Washington, D.C. 20006
(202) 293-2500

January 29, 1997

Its Attorneys

No. of Copies rec'd
List ASODIE

246

TABLE OF CONTENTS

	<u>Page</u>
SUMMARY	ii
I. INTRODUCTION	3
II. ARGUMENT	6
A. A Market-Based Approach to Access Charge Reformation Would Hinder Realization of the Pro-Competitive Objectives of the 1996 Act (§§ 140 - 148, 161 - 217)	6
B. A Prescriptive Approach to Access Charge Reformation Would be Consistent with the Pro-Competitive Objectives of the 1996 Act (§§ 140 - 148, 218 - 240)	18
C. Meaningful Facilities-Based Competition Should be a Precondition to any Substantial Relaxation of Price Cap or Other Access Related Competition (§§ 149 - 160)	23
D. Incumbent LECs are Not Guaranteed Full Recovery of Their of Their Embedded Costs (§§ 247 - 270)	29
E. The Carrier Common Line Charge and the Transport Interconnection Charge Should be Eliminated and the Subscriber Line Charge Increased (§§ 57 - 70)	33
F. Additional Safeguards Should be Adopted with Respect to Terminating Access (§§ 271 -281)	38
G. Once Reformed and Reduced to Forward-Looking Economic Cost, Interstate Access Charges Should be Assessed on Enhanced Services Providers (§§ 282 - 290)	40
III. CONCLUSION	43

SUMMARY

The Telecommunications Resellers Association ("TRA"), a national trade association representing more than 500 entities engaged in, or providing products and services in support of, telecommunications resale, urges the Commission to prescribe access charges that reflect the economic cost of traffic origination and termination, and to forgo relaxation of current constraints on the level and structure of access charges until meaningful facilities-based competition has emerged in the local exchange/exchange access market. TRA further urges the Commission to fully rationalize interstate access charges before the Regional Bell Operating Companies are permitted to offer "in-region," interLATA service. If access charges are permitted to remain at their current inflated levels not only while incumbent local exchange carriers retain their dominant position in the local exchange/exchange access market, but following entry by the RBOCs into the "in-region," interLATA market, incumbent LECs will be able to leverage their continued control of "bottleneck" facilities not only to disadvantage interexchange carrier competitors, but to retard the development of local competition, through "price squeezes" and other anticompetitive abuses.

Consistent with this view, TRA strongly opposes a market-based approach to access charge reform. A market-based approach will not rationalize access charges in a speedy manner, thereby providing, for some indeterminable period of time, incumbent LECs, which have initiated the provision of interLATA service, with a powerful anticompetitive advantage in both the interexchange and the local exchange/exchange access markets. Moreover, the market-based approach envisioned by the NPRM would result in premature relaxation of price cap and other access-related regulatory constraints, thereby further jeopardizing nascent local-exchange/

exchange access competition. It is TRA's strongly-held view that incumbent LEC market conduct will be adequately disciplined only when pervasive facilities-based competition has emerged in the local telecommunications market and that the only incentive that may be strong enough to motivate the RBOCs to permit such facilities-based competitive entry is their desire to provide "in-region," interLATA services.

TRA advocates adoption of a prescriptive approach to access reform which would drive interstate access charges toward forward-looking, economic costs in a more predictable and uniform manner. While it acknowledges that a prescriptive approach would "require that the Commission play a greater role in the telecommunications marketplace," TRA submits that a more aggressive regulatory posture in the near term will ultimately allow for more expeditious deregulation. The "pro-competitive, deregulatory national policy framework" envisioned by Congress is a transitional mechanism which assumes an active role by the Commission in "opening all telecommunications markets to competition." As the Commission has elsewhere recognized, in the "new regulatory regime," the Commission's task is to "affirmatively promote efficient competition using tools forged by Congress."

TRA concurs with the NPRM that deregulation and detariffing of interstate access services that are subject to "substantial competition" would be appropriate. A "substantial competition" analysis should be conducted on a service-by-service and an area-by-area basis, taking into account supply and demand elasticities, as well as market share. Critically, however, TRA submits that competition cannot rise to the level of "substantial competition" unless the competition is provided by one or more facilities-based providers with access to independent local exchange/exchange access networks.

Just as the Commission determined that "increasing the rates for interconnection and unbundled elements offered to competitors would interfere with the development of efficient competition," TRA submits that pricing interstate access at anything more than the forward-looking, economic cost of originating and terminating interstate, interexchange traffic would hinder existing interexchange and emerging local exchange/exchange access competition. "Regulation does not and should not guarantee full recovery of [the incumbent LECs'] embedded costs." Pricing access at TSLRIC/TELRIC levels guarantees incumbent LECs a full competitive return on the present value of the facilities needed to originate and terminate interstate, interexchange traffic; no more is required..

TRA agrees with the NPRM that the subscriber line charge for the second and additional lines used by residential customers and for all lines used by multi-line business customers should be allowed to increase to the level necessary to recover associated per-line loop costs assigned to the interstate jurisdiction. TRA, however, disagrees with the NPRM that the \$3.50 cap on SLCs for residential and single-line business customers should be retained. Costs should be recovered from cost causers in a manner consistent with the way in which the costs are incurred; recovering non-traffic sensitive loop costs through usage-sensitive charges levied on IXCs sends inaccurate pricing signals, thereby encouraging inefficient use of telecommunications services. In the event that all SLCs are uncapped and allowed to recover the portion of subscriber line costs assigned to the interstate jurisdiction, the carrier common line charge could simply be eliminated. TRA agrees with the NPRM that the transport interconnection charge should also be phased out.

Terminating access will remain a bottleneck controlled by whatever LEC provides access for the called party. Given that an IXC cannot influence the level of terminating access charges, it is imperative that terminating access charges be restrained. TRA, accordingly, urges the Commission to ensure that terminating access charges are set at the forward-looking, economic cost of terminating interstate, interexchange traffic.

TRA does not disagree with the NPRM's tentative conclusion that enhanced service providers should not be required to pay interstate access charges so long as the existing access charge system remains in place, provided that this proceeding results in reformation of the existing access charge regime, rationalization of access charge structures and levels, and prompt and dramatic reductions in currently inflated access charges. Certainly, it makes no sense to impose an onerous access charge structure on additional users if that structure is soon to be changed. TRA, however, disagrees that there exists any other reason to treat ESPs preferentially, particularly when ESPs are providing services which compete directly with basic telephony and hence, are being afforded an unfair competitive advantage.

**Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554**

In The Matter of

ACCESS CHARGE REFORM

CC Docket No. 96-262

**PRICE CAP PERFORMANCE REVIEW
FOR LOCAL EXCHANGE CARRIERS**

CC Docket No. 94-1

**TRANSPORT RATE STRUCTURE
AND PRICING**

CC Docket No. 91-213

**USAGE OF THE PUBLIC SWITCHED
NETWORK BY INFORMATION
SERVICE AND INTERNET ACCESS
PROVIDERS**

CC Docket No. 96-263

**COMMENTS OF THE
TELECOMMUNICATIONS RESELLERS ASSOCIATION**

The Telecommunications Resellers Association ("TRA"), through undersigned counsel and pursuant to Section 1.415 of the Commission's Rules, 47 C.F.R. § 1.415, hereby submits the following comments in response to the Notice of Proposed Rulemaking, FCC 96-488, released by the Commission in the captioned docket on December 24, 1996 (the "Notice"). In this proceeding, the Commission has undertaken the daunting task of reforming its existing system of interstate access charges in an effort to render its access charge regime compatible with the new competitive paradigm established by the Telecommunications Act of 1996 ("1996 Act").¹ The Commission has articulated as its "overriding goal" in restructuring its access charge system

¹ Pub. L. No. 104-104, 110 Stat. 56, § 101 - 104 (1996).

the adoption of rules and policies that will foster the competitive provision of access services and "eventually enable marketplace forces to eliminate the need for price regulation of these services."² In achieving this laudable objective, TRA strongly urges the Commission to ensure that the reformatory actions it takes here do not undermine existing competition in the interexchange market, much of which is provided by the hundreds of small to mid-sized carriers that currently populate that market, or hinder the competitive entry by such small to mid-sized providers into the local exchange/exchange access market.

As virtually all segments of the industry have acknowledged, interstate access charges are currently set well in excess of the economic cost of originating and terminating interstate, interexchange traffic.³ If access charges are permitted to remain at their current inflated levels not only while incumbent local exchange carriers ("LECs") retain their dominant position in the local exchange/exchange access market, but following entry by the Regional Bell Operating Companies ("RBOCs") into the "in-region," interLATA market, incumbent LECs will be able to leverage their continued control of "bottleneck" facilities not only to disadvantage interexchange carrier ("IXC") competitors, but to retard the development of local competition, through "price squeezes" and other anticompetitive abuses. Accordingly, TRA urges the Commission to prescribe access charges that reflect the economic cost of traffic origination and termination and to forgo relaxation of current constraints on the level and structure of access

² Notice, FCC 96-488 at ¶ 140.

³ Id. at ¶ 41.

charges until meaningful facilities-based competition has emerged in the local exchange/exchange access market. TRA further urges the Commission to fully rationalize access charges before the RBOCs are permitted to offer "in-region," interLATA service.

I.

INTRODUCTION

A national trade association, TRA represents more than 500 entities engaged in, or providing products and services in support of, telecommunications resale. TRA was created, and carries a continuing mandate, to foster and promote telecommunications resale, to support the telecommunications resale industry and to protect and further the interests of entities engaged in the resale of telecommunications services. Although initially engaged almost exclusively in the provision of domestic interexchange telecommunications services, TRA's resale carrier members have aggressively entered new markets and are now actively reselling international, wireless, enhanced and internet services. TRA's resale carrier members are also among the many new market entrants that are or will soon be offering local exchange telecommunications services, generally through traditional "total service" resale of incumbent local exchange carrier ("LEC") or competitive LEC retail service offerings or by recombining unbundled network elements obtained from incumbent LECs, often with their own switching facilities, to create "virtual local exchange networks."

TRA's resale carrier members serve generally small to mid-sized commercial, as well as residential, customers, providing such entities and individuals with access to rates generally available only to much larger users. TRA's resale carrier members also offer small to

mid-sized commercial customers enhanced, value-added products and services, including a variety of sophisticated billing options, as well as personalized customer support functions, that are generally reserved for large-volume corporate users. And TRA's resale carrier members are at the forefront of industry efforts to diversify and expand service and product offerings, endeavoring in so doing to satisfy in a convenient and cost-effective manner all of the telecommunications needs of both residential and commercial consumers.

Not yet a decade old, TRA's resale carrier members -- the bulk of whom are small to mid-sized, albeit high-growth, companies⁴ -- nonetheless collectively serve millions of residential and commercial customers and generate annual revenues in the billions of dollars.⁵ The emergence and dramatic growth of the resale industry over the past five to ten years has produced thousands of new jobs and myriad new commercial opportunities. In addition, TRA's resale carrier members have facilitated the growth and development of second- and third-tier facilities-based interexchange carriers by providing an extended, indirect marketing arm for their services, thereby further promoting economic growth and development. And perhaps most critically, by providing cost-effective, high quality telecommunications services to the small

⁴ The average TRA resale carrier member has been in business for five years, serves 10,000 customers, generates annual revenues of \$10 million and employs in the neighborhood of 50 people. Among TRA's resale carrier members, roughly 30 percent have been in business for less than three years and over 80 percent were founded within the last decade. And while the growth of TRA's resale carrier members has been remarkable, the large majority of these entities remain relatively small. Nearly 25 percent of TRA's resale carrier members generate revenues of \$5 million or less a year and less than 20 percent have reached the \$50 million threshold. Seventy-five percent of TRA's resale carrier members employ less than 100 people and nearly 50 percent have work forces of 25 or less. Nonetheless, more than a third of TRA's resale carrier members provide service to 25,000 or more customers.

⁵ TRA's resale carriers are well represented among the ten, and constitute more than half of the twenty, largest interexchange carriers in the Nation.

business community, TRA's resale carrier members have helped other small and mid-sized companies expand their businesses and generate new employment opportunities.

President Clinton could have been referring to TRA's resale carrier members when he noted in The State of Small Business: A Report of the President 1994 (at page 7), "a great deal of our Nation's economic activity comes from the record number of entrepreneurs living the American Dream. . . . I firmly believe that we need to keep looking to our citizens and small businesses for innovative solutions. They have shown they have the ingenuity and creative power to make our economy grow; we just need to let them do it."

TRA's interest in this matter is in protecting, preserving and promoting competition within the interexchange market, as well as in speeding the emergence and growth of resale, non-facilities-based, and ultimately facilities-based competition in the local exchange/exchange access market. TRA, accordingly, applauds the Commission for undertaking the formidable task of reforming its access charge regime both to rationalize rates for originating and terminating interstate, interexchange traffic by removing from access charges the myriad subsidies and inflated costs embedded therein, and to "establish fair rules of competition for both the local exchange and interexchange markets."⁶ As noted above, TRA is deeply concerned, however, that access charge reform not be undertaken in a manner that will threaten the currently vibrant competition in the interstate, interexchange market or that will impede competitive entry into the local exchange/exchange access market.

⁶ Notice, FCC 96-488 at ¶ 5.

To this end, TRA strongly urges that prompt action be taken to reduce interstate access charges to the forward-looking economic cost of originating and terminating interstate, interexchange traffic, and that such reductions be completed before the RBOCs are permitted to provide "in-region," interLATA service. Moreover, TRA adamantly opposes relaxation of current restrictions on the level and structure of access charges until such time as meaningful facilities-based local exchange/exchange access competition has emerged. Any delay in reducing currently inflated access charges or any premature relaxation of price cap and other access-related regulation will have serious anticompetitive consequences. Failure to require prompt and dramatic reductions in interstate access charges or to exercise extreme caution in relaxing existing regulatory safeguards will jeopardize realization of the Congressional vision of a fully competitive, dynamic telecommunications market, thereby denying consumers the full benefits of telecommunications competition.

II.

ARGUMENT

A. A Market-Based Approach to Access Charge Reformation Would Hinder Realization of the Pro-Competitive Objectives of the 1996 Act (¶¶ 140 - 148, 161 - 217)

As one of two alternative approaches to access charge reform, the NPRM proposes a "market-based" scheme which would rely upon "marketplace pressure [to] move interstate access prices to competitive levels," incrementally relaxing regulatory constraints as specified "competitive triggers" were achieved.⁷ The market-based approach envisioned by the NPRM

⁷ Id. at ¶ 140.

would provide for three such "competitive triggers:" (i) potential competition -- *i.e.*, "the conditions necessary for efficient local competition to develop" -- (ii) actual competition -- *i.e.*, market entry by one or more competitive providers -- and (iii) substantial competition -- *i.e.*, a competitive marketplace.⁸ Upon achievement of the first "competitive trigger," the NPRM would eliminate "the prohibition against geographic deaveraging within a study area; the ban on volume and term discounts for interstate access services; the current prohibition against contract tariffs and individual request for proposal (RFP) responses; and various restraints on the ability of incumbent LECs to offer new, innovative access services."⁹ Upon achievement of the second "competitive trigger," the NPRM would "(1) eliminat[e] price cap service categories within baskets; (2) remov[e] the ban on differential pricing for access among different classes of customers; (3) end[] mandatory rate structure rules for transport and local switching; and (4) consolidat[e] traffic sensitive and trunking baskets."¹⁰ Upon achievement of the third "competitive trigger," the NPRM would eliminate price cap regulation of interstate exchange access.¹¹

TRA strongly opposes a market-based approach to access charge reform. As TRA will demonstrate below, a market-based approach will not rationalize access charges in a speedy manner, thereby providing, for some indeterminable period of time, incumbent LECs, which have initiated the provision of interLATA service, with a powerful anticompetitive advantage in both

⁸ Id.

⁹ Id. at ¶ 173.

¹⁰ Id. at ¶ 201.

¹¹ Id. at ¶ 149.

the interexchange and the local exchange/exchange access markets.¹² Moreover, the market-based approach envisioned by the NPRM would result in premature relaxation of price cap and other access-related regulatory constraints, thereby further jeopardizing nascent local exchange/exchange access competition.

There is no longer any serious debate regarding the extent of the RBOCs' and the other incumbent LECs' control over local exchange/exchange access "bottlenecks;" indeed, the Commission itself has recently characterized the "local exchange and exchange access market"

¹² "If a BOC is regulated under rate-of-return regulation, a price caps structure with sharing (either for interstate or intrastate services), a price caps scheme that adjusts the X-factor periodically based on changes in industry productivity, or if any revenues it is allowed to recover are based on costs recorded in regulated books of account, it may have an incentive to allocate improperly to its regulated core business costs that would be properly allocated to its competitive ventures. . . . In addition, a BOC may have an incentive to discriminate in providing exchange access services and facilities that its affiliate's rivals need to compete in the interLATA telecommunications services and information services markets. For example, a BOC may have an incentive to degrade services and facilities furnished to its affiliate's rivals, in order to deprive those rivals of efficiencies that its affiliate enjoys. Moreover, to the extent carriers offer both local and interLATA services as a bundled offering, a BOC that discriminates against the rivals of its affiliates could entrench its position in local markets by making these rivals' offerings less attractive. . . . Moreover, if a BOC charges other firms for inputs that are higher than the prices charged, or effectively charged, to the BOC's section 272 affiliate, then the BOC could create a 'price squeeze.' In that circumstance, the BOC affiliate could lower its retail price to reflect its unfair cost advantage, and competing providers would be forced either to match the price reduction and absorb profit margin reductions or maintain their retail prices at existing levels and accept market share reductions. This artificial advantage may allow the BOC affiliate to win customers even though a competing carrier may be a more efficient provider in serving the customer. Unlawful discriminatory preferences in the quality of the service or preferential dissemination of information provided by BOCs to their section 272 affiliates, as a practical matter, can have the same effect as charging unlawfully discriminatory prices. If a BOC charged the same rate to its affiliate for a higher quality access service than the BOC charged to unaffiliated entities for a lower quality service . . . the BOC could effectively create the same 'price squeeze' discussed above." Implementation of the Non-Accounting Safeguards of Sections 271 and 272 of the Communications Act of 1934, CC Docket No. 96-149, FCC 96-489, ¶ 10 - 12 (released December 24, 1996) ("Non-Accounting Safeguards Order").

as "one of the last monopoly bottleneck strongholds in telecommunications."¹³ Confirming this assessment, the Commission recently reported that the "BOCs currently are the dominant providers of local exchange and exchange access services in their in-region states, accounting for approximately 99.1 percent of the local service revenues in those markets."¹⁴

Certainly, Congress intended for the 1996 Act to, among other things, open monopoly local exchange/exchange access markets to competitive entry, to this end, eliminating "not only statutory and regulatory impediments to competition, but economic and operational impediments as well."¹⁵ It belabors the obvious to suggest, however, that a potentially wide gulf exists between a theoretically "contestable" market and a market in which competitors can not only actually enter, but survive and prosper; an order of magnitude difference exists between a theoretically "contestable" market and a fully "contested" market. While competitive potential may evolve into actual competition and ultimately into competition significant enough to discipline the market power of incumbent LECs, the lag in time before local telecommunications markets become fully competitive may, and likely will, be substantial. And this lag in time will be exacerbated by incumbent LEC resistance both to competitive entry and to the competitive provision of local exchange and exchange access service. As succinctly put by the Commission:

¹³ Implementation of the Local Competition Provisions in the Telecommunications Act of 1996, CC Docket No. 96-98, FCC 96-325, ¶ 4 (released August 8, 1996), *pet. for rev. pending sub nom. Iowa Utilities Board v. FCC*, Case No. 96-3321 (8th Cir. Sept. 5, 1996), *recon.* FCC 96-394 (Sept. 27, 1996), *further recon. pending* ("Local Competition First Report and Order").

¹⁴ Non-Accounting Safeguards Order, FCC 96-489 at ¶¶ 10 (footnotes omitted).

¹⁵ Local Competition First Report and Order, FCC 96-325 at ¶ 3.

We recognize that the transformation from monopoly to fully competitive markets will not take place overnight. We also realize that the steps taken thus far will not result in the immediate arrival of fully-effective competition. Accordingly, the Commission and state regulators must continue to ensure against any anticompetitive abuse of residual monopoly power, and to protect consumers from the unfettered exercise of that power.¹⁶

Monopolists do not readily relinquish market power. As the Commission has recently noted, "[b]ecause an incumbent LEC currently serves virtually all subscribers in its local serving area, an incumbent LEC has little economic incentive to assist new entrants in their efforts to secure a greater share of that market."¹⁷ RBOCs and other incumbent LECs can erect a variety of economic and operational barriers to competitive entry into, and competitive survival in, the local telecommunications market. And unless there exists a potent countervailing incentive or disincentive to do otherwise, incumbent LECs will actively seek to forestall competition by interposing these barriers as a profit maximizing strategy.¹⁸

¹⁶ Ameritech Operating Companies: Petition for Declaratory Ruling and Related Waivers to Establish a New Regulatory Model for the Ameritech Region, FCC 96-58, 11 FCC Rcd. 14028, ¶ 130 (released Feb. 15, 1996).

¹⁷ Local Competition First Report and Order, FCC 96-325 at ¶ 10.

¹⁸ The effectiveness of regulation is generally predicated on good faith compliance by regulated entities. The Commission does not have the resources to police and enforce its regulations in the event the subjects of those regulations elect not to comply, particularly if the noncompliance is camouflaged. Good faith compliance is all the more critical if the regulated entities are large, complex organizations with limitless resources to defend against any enforcement actions. It is pure fantasy to think that overburdened regulators with budgets a fraction of the size of the entities they are regulating will be able to ferret out and prosecute any more than an occasional violation. As the Commission itself has recently conceded, "[a]lthough we could prescribe rules that would completely prevent improper cost allocations by enforcing complete separation between regulated telecommunications operations and new activities, we recognize that it would be difficult, if not impossible, to enforce such rules." Implementation of the Non-Accounting Safeguards of Sections 271 and 272 of the Communications Act of 1934, as amended (Notice of Proposed Rulemaking), CC Docket No. 96-149, FCC 96-308, 11 FCC Rcd. 9051, ¶ 7 (released July 18, 1996) ("Non-Accounting Safeguards NPRM") (footnotes omitted).

TRA submits that incumbent LEC market conduct will be adequately disciplined only when pervasive facilities-based competition has emerged in the local telecommunications market and that the only incentive that may be strong enough to motivate the RBOCs to permit such facilities-based competitive entry is their desire to provide "in-region," interLATA services. It is counterintuitive to suggest as does the NPRM that the desire to secure "additional flexibility to respond to competition from facilities-based competitors" will be an adequate incentive "for incumbent LECs to act quickly to open the local exchange and exchange access market to competition."¹⁹ One does not need "additional flexibility to respond to competition" if one can effectively prevent competitive entry or the provision of viable competitive offerings. Accordingly, in order to ensure that local exchange/exchange access competition is permitted to take root, access charge reductions must not only be prescribed by the Commission, but the RBOCs must be denied "in-region," interLATA authority until all such prescribed reductions have been implemented. In the interim, the price cap and other access-related constraints currently imposed on the RBOCs and other price cap incumbent LECs should not be relaxed.

As the NPRM correctly recognizes, "if barriers to competition are not eliminated, a market-based approach to access reform likely would not work."²⁰ The NPRM likewise frankly acknowledges the difficulties inherent in developing "reliable, administratively simple criteria for assessing evidence of competitive entry and [in] determining the existing regulatory constraints that should be relaxed based on such a showing."²¹ The emergence of full facilities-based

¹⁹ Notice, FCC 96-488 at ¶ 142.

²⁰ Id. at ¶ 144.

²¹ Id. at ¶ 142.

competition is the only certain indicator that barriers to competitive entry have been eliminated. Even if all legal and regulatory entry barriers are removed and the more obvious economic and operational barriers to entry -- *e.g.*, number portability, dialing parity and access to rights of way -- have been eliminated, opportunities abound in day-to-day network operation to thwart competition. For example, as the Commission has correctly recognized, the adverse competitive impact of inferior access to operations support functions alone can be devastating:

[I]f competing carriers are unable to perform the functions of pre-ordering, ordering, provisioning, maintenance and repair, and billing for network elements and resale services in substantially the same time and manner that an incumbent can for itself, competing carriers will be severely disadvantaged.²²

TRA's resale carrier members are all too familiar with the crippling impact of inferior operations support. In the late 1980s and early 1990s, AT&T Corp. ("AT&T") wreaked havoc on its resale carrier customers by failing to timely provision orders or to timely provide the call detail necessary to bill customers. And AT&T was able to engage in such conduct even though it faced two sizeable facilities-based competitors, each of which operated a national fiber-optic network, as well as a host of other regionally oriented facilities-based competitors. Thus, for example, a 1994 survey of its resale carrier members undertaken by TRA revealed that while most network service providers generally provisioned service orders within 15 days, with the large majority of orders being processed within 10 days, survey respondents who obtained network services from AT&T reported provisioning intervals for outbound service of between sixteen days and more than 120 days, with delays generally in the 16 to 60 day range. Likewise,

²² Local Competition First Report and Order, FCC 96-325 at ¶ 518.

with respect to "800" service, more than two thirds of the survey respondents taking network services from AT&T reported provisioning delays of 26 days or more, ranging upward to 120 days. The survey also revealed that AT&T rejected upwards to six times more service orders than other long distance network providers.²³ And the large majority of respondents who characterized unbilled toll as a continuing problem identified AT&T as their network services provider.²⁴

Accordingly, simply providing for competitive entry is meaningless without more. Likewise, market entry by competing providers is meaningless without more. Indeed, as the above discussion confirms, even the presence of sizeable facilities-based competitors with *non diminimis* market shares does not necessarily translate into market forces adequate to discipline the behavior of a carrier possessed of an overwhelming market share. Even facilities-based competitors would remain vulnerable to anticompetitive abuses by incumbent LECs not only to the extent that they lease facilities from incumbent LECs, but simply because they must interconnect with the incumbent LECs' networks.

While the Commission would be able to determine when legal and regulatory barriers to competition had been removed, there is no way for the Commission to ascertain whether such practical competitive barriers as inadequate operational support remain or once remedied, would not reappear. Entities that control critical network facilities can allow

²³ Hence, it is not surprising that a majority of the survey respondents identifying AT&T as their network services provider characterized "jamming" -- *i.e.*, failure to process orders -- as a "very serious" or "serious" problem, while among respondents who identified other carriers as their network services providers, only a small handful identified "jamming" as a serious concern.

²⁴ See, *e.g.*, Opposition of TRA to Motion of AT&T Corp. to be Reclassified as a Non-Dominant Carrier, CC Docket No. 79-252 (filed June 9, 1995).

competitive entry and even permit competitors to thrive for some period of time before devastating their businesses through anticompetitive abuse of that network control. Only if one or more competitors need no longer rely upon the incumbent LEC to serve their customers and such competitors have established a viable market position can a market be said to be truly contested and even in this circumstance, if the incumbent LEC retains an overwhelming market share, it will be able to act to disadvantage other competitors that remain reliant on its network services.

A more detailed analysis of the market-based approach advocated by the NPRM confirms the above assessment. Initially, the NPRM's market-based approach is predicated on a false assumption. The NPRM opines that the Commission's "primary role" in facilitating market-based reform is "to remove regulatory requirements that inhibit the operation of market forces."²⁵ It is not, however, regulatory requirements that stand in the way of cost-based access pricing, but the continued control of "bottleneck" facilities by incumbent LECs. Hence, removal of regulation will not facilitate reductions in access charges; indeed, such action would likely serve to perpetuate excessively-priced interstate access. Regulatory intervention designed to counter the market power of the incumbent LECs is required.

The NPRM proposes to declare the first competitive trigger satisfied when an incumbent LEC complies with the requirements of Sections 251 and 252 of the 1996 Act and the Commission's implementing rules.²⁶ Thus, the NPRM would require an incumbent LEC (i) to

²⁵ Notice, FCC 96-488 at ¶ 161.

²⁶ 47 U.S.C. § 251, 252.

make network elements available on an unbundled basis and at cost-based prices (§§ 251(c)(3) and 252 (d)(1)), (ii) to transport and terminate traffic at cost-based rates (§ 251(d)(2)), (iii) to provide for resale of retail services at wholesale prices reflective of reasonably avoidable retail costs (§§ 251(c)(4) and 252 (d)(3)), (iv) to provide operations support in a nondiscriminatory manner (§ 251(c)(3)), (v) to provide dialing parity, number portability and access to rights of way (§ 251(a)(2), (3), (4)), and (vi) to ensure open and nondiscriminatory access to network standards and protocols (§§ 251(c)(2), (3), (5)). In exchange for doing that which they are legally bound to do, incumbent LECs would be permitted to geographically deaverage interstate access charges, offer interstate access services at volume and term discounts, as well as through contract tariffs, and introduce new access services on a streamlined basis.²⁷ The incumbent LECs, of course, would be afforded this increased pricing flexibility even though access charges remained at inflated levels and thus could use the increased flexibility to selectively respond to and defeat nascent local exchange/exchange access competition, while at the same time disadvantaging competing providers of interexchange services.

The NPRM contends that such reforms, if implemented when a market is subject to "potential competition," would "not impede competitive entry."²⁸ While theoretically TRA does not disagree, the point is not a compelling one. It is irrelevant whether these relaxed regulations could be used to thwart entry by competitive providers; in a "potentially competitive" market, incumbent LECs could use their control of network facilities to impede competitive entry

²⁷ Notice, FCC 96-488 at ¶ 173.

²⁸ Id. at ¶ 169.

in a host of other ways. The increased pricing flexibility would enhance the effectiveness of these other stratagems. To the extent that a new market entrant must rely upon the network services of an incumbent LEC, it will be vulnerable to strategic, anticompetitive manipulation of access to and the quality of those network services. While ultimately access provided by competitors using unbundled network elements will likely drive access charges at least in the direction of cost, the reductions produced by such "competitive forces" will be far from prompt and likely will be implemented on a highly selective basis.

Further relaxation of price cap and other regulatory constraints based upon achievement of "actual competition," as envisioned by the NPRM, is no less a threat to competition, existing and emerging, in the interexchange and local exchange/exchange access markets. "Actual competition" would apparently entail the "demonstrated presence of competition," as well as "full implementation of competitively neutral universal service support mechanisms and . . . credible and timely enforcement of pro-competitive rules."²⁹ The NPRM suggests that "[a] competitive presence short of substantial competition would help to ensure that the opening of the network has happened in fact, not just in theory, and would allow for further reforms under conditions short of the substantial competition necessary for full deregulation and detariffing."³⁰ These "further reforms" would include elimination of within-basket price cap service categories, allowance of differential pricing of access among different classes of

²⁹ Id. at ¶ 202.

³⁰ Id. at ¶ 201.

customers, elimination of mandatory transport and local switching rate structures, and consolidation of the traffic-sensitive and trunking baskets.³¹

TRA submits that if the Commission relies on "actual competition" to drive access charges toward cost, it will wait for an extended period of time and the competitive damage inflicted in the interexchange market during the interim period will likely be incalculable. Moreover, as discussed above, anything short of meaningful facilities-based competition is ephemeral. Again as noted above, to the extent that competitors must rely upon the network facilities of incumbent LECs to serve their customers, they are vulnerable to anticompetitive abuses which can hinder or defeat competition. And to the extent that price cap and other access related regulatory constraints are lifted before such facilities-based competition is present, the resultant increased pricing flexibility can be used to undermine existing competitors.

The actual competition "competitive trigger" would apparently be satisfied by competitors providing alternate service offerings through resale of incumbent LEC services or in reliance upon unbundled network elements obtained from the incumbent LEC.³² The NPRM assumes that simply because "[u]nbundled elements provide a ubiquitous substitute for access

³¹ Id.

³² Resale carriers are uniquely vulnerable to anticompetitive abuses. Not only are resale carriers generally dwarfed in size and resources by their underlying network providers, but they are entirely dependent upon these underlying carriers for the network services necessary to provide retail services to their customers. Resale carriers are particularly vulnerable to service order provisioning delays, competitive abuse of confidential carrier data, manipulation of service quality, and untimely, inaccurate or incomplete call detail reporting, not to mention strategic rate manipulation. Resale carriers have long been victimized by such tactics in the long distance and wireless industries, losing customers because service orders were not timely processed, having their customer bases raided through abuse of their carrier confidential data by their network providers, experiencing cash-flow difficulties because call detail records were withheld or bastardized, and being denied access to rates and services that have been made available to other users with commensurate, and often substantially lower, traffic volumes.

service," a competitor that provides service using unbundled network elements obtained from an incumbent LEC will be in a position to drive access charges toward economic cost.³³ Elsewhere, however, the Commission has questioned the competitive pressure that can be brought to bear on facilities-based providers by competitors reliant upon such entities for network services. Thus, in the wireless context, the Commission noted that:

While cellular resellers do provide competition on price to facilities-based cellular carriers, they may not be able to mitigate whatever market power such carriers have due to the current duopolistic nature of the Commission's frequency allocation.³⁴

As noted previously, it is TRA's strongly held belief that the Commission should prescribe access charges that reflect the economic cost of traffic origination and termination and forgo relaxation of current restraints on the level and structure of access charges until meaningful facilities-based competition has emerged in the local exchange/exchange access market. Moreover, all such access charge reductions should be fully implemented before the RBOCs are permitted to provide "in-region," interLATA service.

**B. A Prescriptive Approach to Access Charge Reformation
Would be Consistent with the Pro-Competitive Objectives
of the 1996 Act (¶¶ 140 - 148, 218 - 240)**

The second alternative approach to access charge reform proposed by the NPRM is a "prescriptive" arrangement. Under such a prescriptive approach, the Commission would "require incumbent LECs to move their prices to specified levels and allow such LECs limited

³³ Id. at ¶ 170.

³⁴ Annual Report and Analysis of Competitive Market Conditions with Respect to Commercial Mobile Services, 10 FCC Rcd. 8844, ¶ 27, fn. 46 (1995).

pricing flexibility until they can demonstrate they face actual competition for access."³⁵ Because such an approach would provide for quick, certain and uniform reductions in access charges, ensuring that access is universally priced at the economic cost of originating and terminating interstate, interexchange traffic, it would serve to preserve and protect existing interexchange competition and to promote and foster local exchange/exchange access competition. As the Commission recently noted:

Indeed, the relationship between fostering competition in local telecommunications markets and promoting greater competition in the long distance market is fundamental to the 1996 Act. Competition in local exchange and exchange access markets is desirable, not only because of the social and economic benefits competition will bring to consumers of *local* services, but also because competition eventually will eliminate the ability of an incumbent local exchange carrier to use its control of bottleneck local facilities to impede free market competition.³⁶

TRA agrees with the NPRM that the purpose of a prescriptive approach to access reform should be to "drive interstate access rates to economically efficient levels."³⁷ TRA also concurs that "a prescriptive approach would move access charges to forward-looking economic costs in a more predictable and uniform manner than a market-based approach."³⁸ And while TRA acknowledges, as noted by the NPRM, that a prescriptive approach would "require that the Commission play a greater role in the telecommunications marketplace,"³⁹ TRA submits that a

³⁵ Notice, FCC 96-488 at ¶ 141.

³⁶ Local Competition First Report and Order, FCC 96-325 at ¶ 4.

³⁷ Notice, FCC 96-488 at ¶ 220.

³⁸ Id. at ¶ 218.

³⁹ Id.